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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

* * *

NO. 74-6761

* * *

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

HARRY LEE WILLIAMS,
Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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SUBJECT INDEX

Page

OPINION BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

CONSTITUTIONAL PROVISIONS INVOLVED . 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT . . . .

1. The Holding Of The United States Court Of Appeals For The Fifth Circuit That Trial In Jail Clothing Destroys A Defendant's Presumption Of Innocence And Thereby Deprives Him Of A Fair Trial Is Not Judicially Sound 4

2. The Fifth Circuit's Holding That A Trial In Jail Clothes Denies A Defendant A Fair Trial Has Had And Will Continue To Have A Catastrophic Impact On The Administration Of Justice In Texas And In Other Jurisdictions 10

3. This Court Should Grant Certiorari So As To Resolve The Conflict Now Existing Between Several Circuit Courts As To Whether Or Not The Trial Of A Defendant In Jail Clothing Is Inherently Prejudicial And Automatically Denies A Defendant His Right To A Fair Trial 11

SUBJECT INDEX -- Continued

	Page
CONCLUSION	13
PROOF OF SERVICE	15
APPENDIX "A"	-1a-
APPENDIX "B"	-1b-
APPENDIX "C"	-1c-
APPENDIX "D"	-1d-

INDEX OF AUTHORITIES

CASES	Page
Anderson v. Watt, 475 F.2d 881 (10th Cir. 1973)	9, 12
Bentley v. Crist, 469 F.2d 854 (9th Cir. 1972)	13
Brooks v. State of Texas, 381 F.2d 619 (5th Cir. 1967)	4
Gaito v. Brierley, 485 F.2d 86 (3rd Cir. 1973)	11
Garcia v. Beto, 452 F.2d 655 (5th Cir. 1972)	4
Hall V. Cox, 344 F.Supp. 786 (W.D Va. 1971)	9, 13
Hernandez v. Beto, 443 F.2d 634 (5th Cir. 1971), cert.den. 404 U.S. 897 (1971)	4, 8, 12
Lemons v. United States, 489 F.2d 344, 347 (3rd Cir. 1974)	12
May v. Peyton, 268 F.Supp. 928 (W.D. Va. 1967), rev'd on other grounds, 398 F.2d 476 (4th Cir. 1968)	13
McFalls, v. Peyton, 270 F.Supp. 577 (W.D. Va. 1967), aff'd 401 F.2d 890 (4th Cir. 1968) cert.den. 394 U.S. 951 (1969)	13
Scruggs v. Estelle, No. 74-3180 (5th Cir.)	5

INDEX OF AUTHORITIES -- Continued

CASES	Page
Thomas v. Beto, 474 F.2d 981 (5th Cir. 1973)	4
United States ex rel Stahl v. Henderson, 472 F.2d 556 (5th Cir. 1973)	4
United States v. Williams, 498 F.2d 547 (10th Cir. 1974)	9
Williams v. State, 477 S.W.2d 24 (Tex.Crim. 1972)	3, 12
Xanthull v. Beto, 307 F.Supp. 903 (S.D. Tex. 1970)	8
OTHER AUTHORITIES	
UNITED STATES CONSTITUTION	
Sixth Amendment	2
Fourteenth Amendment	2
28 U.S.C., Sec. 1254(1)	2

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NO. _____

October Term, 1974

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

HARRY LEE WILLIAMS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, W. J. Estelle, Jr., respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on September 6, 1974.

OPINION BELOW

The opinion delivered in the court below is reported at 500 F.2d 206 (1974) and is appended to this Petition as Appendix "A". The opinion of the United States District Court for the Southern District of Texas is reported at 364 F.Supp. 335 (1973). and a copy is appended hereto as Appendix "B". A Stay of Mandate was granted by the United States Court of Appeals to and including December 5, 1974. Also attached as Appendix "C" is a copy of the

opinion of the Court of Criminal Appeals of Texas affirming Respondent's conviction.

JURISDICTION

As indicated above, the opinion of the United States Court of Appeals was entered on September 6, 1974. (See Appendix "A"). A copy of the judgment is attached hereto as Appendix "D".

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTION PRESENTED

Whether a defendant's trial in jail clothing destroys the "presumption of innocence" so as to deny him a fair trial?

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . ."

The Fourteenth Amendment provides:

> ". . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Williams was convicted in the 177th Judicial District Court of Harris County, Texas, for the offense of assault with intent to murder with malice. Williams plead not guilty, was found to be guilty by the jury, and was assessed by the court as punishment confinement for ten years in the state penitentiary. The said judgment and sentence was appealed to the Court of Criminal Appeals of Texas, and said judgment of conviction was affirmed in an opinion delivered February 9, 1972, styled Williams v. State, 477 S.W.2d 24 (Tex.Crim. 1972). Williams in his state court appeal, raised substantially the same issue that was raised in his application for writ of habeas corpus in the United States District Court below, and in the United States Court of Appeals for the Fifth Circuit.

Respondent filed his application for writ of habeas corpus in the United States District Court for the Southern District of Texas, and on October 2, 1973, the District Court denied relief holding that Williams' trial in jail clothing, while inherently prejudicial, was under the facts presented, harmless error. Williams appealed this decision to the United States Court of Appeals, and on September 6, 1974, the Fifth Circuit reversed the holding of the United States District Court ruling that Williams' trial in jail clothing was inherently prejudicial and was not harmless error.

It is now the established rule in the Fifth Circuit that the trial of a criminally accused attired in prison clothing infringes the fundamental right to

the presumption of innocence. See Hernandez v. Beto, 443 F.2d 634 (5th Cir. 1971), cert. denied 404 U.S. 897 (1971), and Brooks v. State of Texas, 381 F.2d 619 (5th Cir. 1967). This per se rule adopted by the Fifth Circuit automatically upends the conviction of all defendants tried in jail clothing with the exception of the following modifications:

(a) When a defendant is on trial for a prison offense against a fellow inmate in an environment where such clothing is the normal attire, there is no prejudice for the jury to see that which is already known. United States ex rel Stahl v. Henderson, 472 F.2d 556 (5th Cir. 1973).

(b) If trial counsel intended to use jail clothing as a tactic to gain sympathy with the jury, no reversal is warranted. Garcia v. Beto, 452 F.2d 655 (5th Cir. 1972).

(c) If all of the facts lead unerringly to guilt, and no possible inference clouds or conflicts any essential or material fact, then the trial of a defendant in jail clothes may be harmless beyond a reasonable doubt. Thomas v. Beto, 474 F.2d 981 (5th Cir. 1973).

REASONS FOR GRANTING THE WRIT

1. The Holding Of The United States Court Of Appeals For The Fifth Circuit That Trial In Jail Clothing Destroys A Defendant's Presumption Of Innocence And Thereby Deprives

Him Of A Fair Trial Is Not Judiciaily Sound.

Petitioner respectfully submits that the trial of a defendant in jail clothing does not suggest or indicate to the jury that the defendant is guilty. The fact that a defendant wore jail clothes during a jury trial does not create a negative inference. A juror could certainly be expected to know that many defendants who are arrested are kept in jail prior to the time they are brought to court for trial. This fact does not destroy the presumption of innocence and neither should the presumption of innocence be destroyed by their being seen in the courtroom in jail attire. A defendant's presence before the jury in jail clothing only confirms that he has been held in jail prior to the time of the trial, and Petitioner strongly maintains that this does not influence the jury to find the defendant guilty.

Petitioner states that the nature of clothing worn by a defendant is not so inherently prejudicial as to deny him his right to a fair and impartial trial, and that the testimony given in a case presently pending in the Fifth Circuit, Scruggs v. Estelle, No. 74-3180, supports this position. In Scruggs the following testimony developed at a state habeas hearing reflects the following by three jurors who testified at the state habeas hearing concerning the defendant's trial in jail clothes.

Juror Clemons:

"Q. Mrs. Clemons, do you recall how the Petitioner was

dressed on the occasion of that trial?

A. No, I have a vague recollection of a gray or blue and white but I couldn't describe what he was wearing at all.

Q. Do you recall whether or not the way that he was dressed in any way affected your verdict?

A. No, it didn't affect me.

Q. I will ask you whether or not you were satisfied in your own mind based purely on the evidence that you heard from the witness stand that he was guilty?

A. Yes.

Q. And, in the occasion of fixing his punishment, did the manner in which he was dressed in any way affect the punishment that you gave him?

A. No." (S/F 5).

Juror Austin:

"Mr. Austin, do you now recall

how Mr. Scruggs was dressed at that trial?

A. Yes, sir, I do. He was dressed just as he is right now sir.

Q. The same type of blue coveralls that he's wearing now?

A. Yes, sir.

Q. Do you recognize that as being any particular type of attire?

A. Not necessarily so. It's a uniform-type coverall which is about all I can say about it.

Q. Do you recall any identifying marks that he had on his clothing at that time?

A. No, sir, I sure don't.

Q. In the course of your deliberations as a juror, I will ask you whether or not the manner in which he was dressed influenced your verdict?

A. No, sir. I can say definitely not because I was more or less interested in the facts

rather than on the appearance of him.

Q. All right, sir, and I will ask you whether or not that in any way influenced the amount of punishment that you gave him?

A. No, sir, it did not." (S/F 7, 8).

Juror Fenton:

"Q. Do you recall whether or not the manner in which he was dressed in any way affected your verdict?

A. I don't think the manner in which he was dressed would have influenced it very much. If it had of, it probably would have been in sympathy with the defendant." (S/F 11).

Petitioner's position is supported by the United States District Court for the Southern District of Texas which, (before the Fifth Circuit's decision in Hernandez v. Beto), held in Xanthull v. Beto, 307 F.Supp. 903 (S.D. Tex. 1970), that

"The tenuous possibility that the jury might have been influenced for or against defendant's guilt in this case by his jail clothing is too frail a reed to rely upon as a predicate for setting aside the state court conviction."

The court also held that a defendant's attire in jail clothing could have aroused the sympathy of the jury and thereby mitigated other overwhelming direct evidence of his guilt.

In Hall v. Cox, 324 F.Supp. 786 (W.D. Va. 1971), the court held that the fact that a defendant was tried in prison uniform was not so prejudicial as to deprive him of due process of law, and the Tenth Circuit has held that the nature of clothing worn by a defendant is not inherently prejudicial to his right to a fair and impartial trial. Anderson v. Watt, 475 F.2d 881 (10th Cir. 1973). In United States v. Williams, 498 F.2d 547 (10th Cir. 1974), a federal prisoner was displayed before the jury while wearing soiled jail clothing. Although the defendant declined an offer by the Deputy Marshal to change to his street clothes the United States District Judge held:

"It's the Court's judgment, however, that there has not been any substantial prejudice by reason of appearance for this much of the trial in the T-shirt and levi's."

Certainly being tried in jail clothes no more destroys the presumption of innocence than does the

reading to the jury of the indictment which states that the grand jurors, good and lawful men, upon their oath do swear that a defendant has committed some act that is against the peace and dignity of the State.

2. The Fifth Circuit's Holding That A Trial In Jail Clothes Denies A Defendant A Fair Trial Has Had And Will Continue To Have A Catastrophic Impact On The Administration Of Justice In Texas And In Other Jurisdictions.

The Fifth Circuit's unequivocal holding that trial in jail clothes infringes the fundamental right to the presumption of innocence has caused a flood of writs to be filed by prisoners tried or contending they were tried in their prison clothes. In the State of Texas alone, there have been eight cases considered by the Fifth Circuit on the jail clothes issue and nine more are in the process of being appealed. There are at present seventeen cases pending in the United States District Courts on the prison clothes question. These statistics do not include the jail clothes cases in the state courts of Texas and which will be in the federal courts upon the exhaustion of state court remedies.

The decision in the instant case holding that waiver of a jail clothes objection cannot be inferred from failure to object if trial in prison garb is customary in the jurisdiction will serve as a stimulus to all defendants to claim error by contending

they were tried in jail clothes. Any defendant who was tried in his prison clothes on either a primary conviction or a prior conviction used for enhancement will be entitled to a new trial under the holding of the Fifth Circuit, subject to the showing by the State of overwhelming evidence of guilt or an admission from a defendant's attorney that he allowed the defendant to be tried in jail clothes to invoke jury sympathy.

The impact of the Fifth Circuit's holding on the administration of justice makes this an appropriate case for this Court to grant certiorari and resolve.

3. This Court Should Grant Certiorari So As To Resolve The Conflict Now Existing Between Several Circuit Courts As To Whether Or Not The Trial Of A Defendant In Jail Clothing Is Inherently Prejudicial And Automatically Denies A Defendant His Right To A Fair Trial.

As mentioned above, the holding in the Fifth Circuit is that the trial of a defendant in prison clothing is inherently prejudicial and will lead to the reversal of a defendant's state court conviction unless the state can establish that all of the facts of the crime lead unerringly to guilt, or that trial counsel intended to use jail clothing as a tactic to gain sympathy with the jury. The Third Circuit appears to be in accord with this view. See Gaito v. Brierley, 485 F.2d 86 (3rd Cir. 1973), where the

court held that compelling a defendant to appear before a jury in prison clothing unconstitutionally infringes his due process right to be presumed innocent until proven guilty. However, at least one of the judges of that Circuit disagrees with the holding. Lemons v. United States, 489 F.2d 344, 347 (3rd Cir. 1974).

In conflict with these two Circuits is the holding of the Tenth Circuit and the Fourth Circuit. The Tenth Circuit in Watt v. Page, 452 F.2d 1174 (1972), cert. den. 405 U.S. 1070 (1972), expressly rejected the Fifth Circuit's holding in Hernandez v. Beto, and said at page 1176,

> "We do not hold that the nature of the clothing worn by the petitioner at his trial was inherently prejudicial of his right to a fair and impartial trial."

This case was sent back for further development of the facts, and on the second appeal the Tenth Circuit again reaffirmed their view that the clothing worn by a defendant at his trial is not inherently prejudicial to his right to a fair and impartial trial. See Anderson v. Watt, supra. The last writing to Petitioner's knowledge on this issue by the Tenth Circuit is found in United States v. Williams, supra. In that case the Tenth Circuit again said they expressly rejected the per se rule of the Fifth Circuit as set out in Hernandez v. Beto.

The Fourth Circuit is in accord with the Tenth Circuit and has stated that in the absence of

a showing of prejudice, a defendant is not denied a fair trial because he appeared before the jury in his prison uniform. See McFalls v. Peyton, 270 F.Supp. 577 (W.D. Va. 1967), aff'd 401 F.2d 890 (4th Cir. 1968), cert.den. 394 U.S. 951 (1969). To the same effect is Hall v. Cox, supra, where the court stated that the fact that a defendant was tried in prison uniform was not so prejudicial as to deprive him of due process of law. See also May v. Peyton, 268 F.Supp. 928 (W.D. Va. 1967), rev'd on other grounds, 398 F.2d 476 (4th Cir. 1968). The position of the Ninth Circuit on this question is not clear as the court held in Bentley v. Crist, 469 F.2d 854 (9th Cir. 1972), that compelling the accused to wear prison clothing may deny to him the presumption of innocence. This Court should grant certiorari to settle the conflict now existing between the Circuits on this question.

CONCLUSION

For the above and foregoing reasons, the Petition for Certiorari should be granted. Petitioner prays that the holding below -- that trial in jail clothes destroys the presumption of innocence -- should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

I, Dunklin Sullivan, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been served on Respondent by placing same in the United States Mail, certified, postage prepaid, addressed as follows: Mr. Ben L. Aderholt, Attorney at Law, 711 Fannin, Suite 1100, Houston, Texas 77002, on this the _____ day of November, 1974.

DUNKLIN SULLIVAN
Assistant Attorney General

APPENDIX "A"

Harry Lee WILLIAMS, Petitioner-Appellant,

v.

W. J. ESTELLE, Director, Texas Department of Corrections, and C. V. Kern, Sheriff, Respondents-Appellees.

No. 73–3854.

United States Court of Appeals,
Fifth Circuit.

Sept. 6, 1974.

State prisoner filed petition for writ of habeas corpus to secure his release from imprisonment under sentence for assault with intent to kill with malice aforethought. The United States District Court for the Southern District of Texas, Carl O. Bue, Jr., J., 364 F.Supp. 335, denied relief and the prisoner appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that prisoner did not waive his objection to being tried in prison garb even though he made no formal objection at trial; that decision that trial in prison garb is inherently unfair was applicable retroactively; and that error in trying prisoner in prison garb was not harmless.

Reversed and remanded.

1. Criminal Law ⇐660

To warrant inference that objection to trial in prison garb has been waived due to failure to object at trial, it must be shown that practice of trying prisoners in prison garb was not customary and might not have been insisted upon if objected to, or that accused hoped to elicit sympathy by his appearance in such clothing.

2. Criminal Law ⇐660

Accused who requested civilian clothing did not waive his objection to being tried in prison garb even though he made

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INDEXED

no formal objection to being tried in such clothing where practice of trying prisoners in such clothing was customary in jurisdiction in which he was tried and there was no evidence that his counsel used his appearance to evoke sympathy from the jury.

3. Courts ⇐100(1)

If new rule announced by court serves broad social policy, such as deterrence of unconstitutional actions by law enforcement officials, courts are reluctant to invoke the rule retroactively; however, rules designed to enhance reliability of determinations of guilt or innocence are usually applied retroactively.

4. Courts ⇐100(1)

"Certainty and frequency" of prejudice which new rule announced by court is designed to eliminate are important determinants of the appropriateness of applying the new rule retroactively.

5. Criminal Law ⇐633(1)

Whether a practice is prejudicial to rights of an accused must be determined in light of both the accused's interest in an accurate determination of guilt or innocence and the state's interest in an efficient criminal justice system unburdened by excessive delay or complication.

6. Courts ⇐100(1)

Decision that trial in prison garb is inherently unfair and denies due process was applicable retroactively.

7. Habeas Corpus ⇐85.2(1)

Petitioner who seeks writ of habeas corpus on ground that trial in prison garb has denied him due process has burden of proving that the alleged error has actually occurred.

8. Criminal Law ⇐1166.11

Error in trying accused in prison garb is harmless if guilty verdict is supported by overwhelming evidence.

9. Habeas Corpus ⇐25.1(3)

Error in trying accused, who was charged with assault with intent to kill with malice aforethought, in prison garb was not harmless where evidence of malice aforethought and of intent to kill was not overwhelming.

Appeal from the United States District Court for the Southern District of Texas.

Before TUTTLE, COLEMAN and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge:

Petitioner Harry Lee Williams appeals from denial of habeas corpus by the district court. He was convicted of assault with intent to kill with malice aforethought in a Texas state court in November 1970. The principal contention in this proceeding is that petitioner's right to due process of law was violated when he was compelled to wear a prison uniform [1] at his jury trial,[2] despite his request for his readily available civilian clothes. We reverse and remand for a new trial.

1. The Due Process Implications of Trial in Prison Garb

In Brooks v. Texas, 5 Cir., 1967, 381 F.2d 619, 624, this Court characterized trial in prison garb as "inherently unfair." Four years later, in Hernandez v. Beto, 5 Cir., 1971, 443 F.2d 634, we reaffirmed this language in *Brooks* and held the practice to be constitutional error—an impingement upon the presumption of innocence.[3] We added, however, that "[a]

1. It is undisputed that Williams' clothing was immediately recognizable as prison garb. *Cf.* United States v. Whitaker, 10 Cir., 1970, 435 F.2d 1300; Klinger v. Erickson, D.S.D., 1971, 328 F.Supp. 674.

2. *Cf.* United States v. Social Services Dep't, E.D.Pa., 1967, 263 F.Supp. 971, 975 (bench trial in prison garb held nonprejudicial).

3. Three other circuits have passed on this question. The Tenth Circuit has held that trial in prison garb is not *inherently* prejudicial, but has overturned one conviction because of the taint created by the practice. Anderson v. Watt, 10 Cir., 1973, 475 F.2d 881. *Cf.*

defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error." 443 F.2d at 637.

[1, 2] Waiver of the objection cannot be inferred merely from failure to object if trial in prison garb is customary in the jurisdiction. It must be shown that the practice was not customary and might not be insisted upon if objected to, or that the defendant hoped to elicit sympathy by his appearance in such clothing. *See* Hernandez v. Beto, *supra*, 443 F.2d at 636–637; Hollins v. Beto, 5 Cir. 1972, 467 F.2d 951, 952; Goodspeed v. Beto, 5 Cir., 1972, 460 F.2d 398, 400. In the present case, as in *Hernandez*, the practice was customary, and there was no evidence that counsel used Williams' appearance to evoke sympathy from the jury. Therefore, the district court correctly found there was no waiver, though no formal objection to prison garb was made by Williams' counsel at trial. 364 F.Supp. at 343.

II. Retroactive Application of *Hernandez*

Williams' trial occurred before our decision in *Hernandez*, and so we must determine whether *Hernandez* is to be applied retroactively.[4] In recent years the courts have abandoned the traditional practice of automatically giving retroactive effect

Watt v. Page, 10 Cir., 1972, 452 F.2d 1174; McFalls v. Peyton, W.D.Va., 1967, 270 F.Supp. 577. The Ninth and Third Circuits have followed *Hernandez*. Bentley v. Crist, 9th Cir., 1972, 469 F.2d 854; Gaito v. Brierley, 3 Cir., 1973, 485 F.2d 86. A number of state courts have also found trial in prison garb to be constitutional error. Commonwealth v. Keeler, 216 Pa.Super. 193, 264 A.2d 407 (1970); Miller v. State, 249 Ark. 3, 457 S.W.2d 848 (1970); People v. Shaw, 381 Mich. 467, 164 N.W.2d 7 (1969); People v. Zapata, 220 Cal. App.2d 903, 34 Cal.Rptr. 171 (1963); Eaddy v. People, 115 Colo. 488, 174 P.2d 717 (1946); Collins v. State, 70 Okl.Cr. 340, 106 P.2d 273 (1940); Shultz v. State, 131 Fla. 757, 179 So. 764 (1934).

4. We find no discussion in any decision on the question whether this rule should be applied retroactively. Both the Ninth and Third Circuits, however, have given the rule retroactive effect, Bentley v. Crist, *supra*; Gaito v. Brierley, *supra*, by announcing it in a habeas appeal. *See* Jackson v. Denno, *infra*; Stovall v. Denno, *infra*, 388 U.S. at 298, 87 S.Ct. at 1970. A district court in the Fifth Circuit has also applied the rule retroactively via habeas corpus. Dennis v. Dees, E.D.La., 1968, 278 F.Supp. 354.

to judicial decisions. *See* Norton v. County of Shelby, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178 (1886). In Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), the Supreme Court consulted three criteria in holding that Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (applying the Fourth Amendment exclusionary rule to the states) was not to apply retroactively: (1) the purpose of the newly announced rule; (2) the extent of reliance on the old rule by law enforcement officials; and (3) the probable effect of retroactive application on the administration of justice. *See also* Pruett v. State of Texas, 5 Cir. 1973, 470 F.2d 1182, 1184.

[3] If a new rule serves a broad social policy—such as deterrence of unconstitutional actions by law enforcement officials—the courts have been reluctant to invoke retroactivity. *See* Williams v. United States, 401 U.S. 646, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971); Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969); Tehan v. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966); Linkletter v. Walker, *supra*; Mackey v. United States, 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971); Fuller v. Alaska, 393 U.S. 80, 89 S.Ct. 61, 21 L.Ed.2d 212 (1968); Lyon v. United States, 5 Cir., 1969, 416 F.2d 91; Monroe v. United States, 5 Cir., 1970, 435 F.2d 160. On the other hand, rules designed to enhance the reliability of determinations of guilt or innocence are usually applied retroactively. *See* Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); Eskridge v. Washington State Prison Board, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269 (1958); Arsenault v. Massachusetts, 393 U.S. 5, 89 S.Ct. 35, 21 L.Ed.2d 5 (1968); McConnell v. Rhay, 393 U.S. 2, 89 S.Ct. 32, 21 L.Ed.2d 2 (1968); Smith v. State of Texas, 5 Cir., 1968, 395 F.2d 958.

[4] This criterion is not an automatic guide to whether retroactivity is justified. "[T]he question whether a constitutional rule of criminal procedure does or does not enhance the

reliability of the fact-finding process at trial is necessarily a matter of degree." Johnson v. New Jersey, 384 U.S. 719, 729, 86 S.Ct. 1772, 1778, 16 L.Ed.2d 882 (1966); Adams v. Illinois, 405 U.S. 278, 281, 92 S.Ct. 916, 918, 31 L.Ed.2d 202 (1972); Gosa v. Mayden, 413 U.S. 665, 680, 93 S.Ct. 2926, 2936, 37 L.Ed.2d 873 (1973); Michigan v. Payne, 412 U.S. 47, 55, 93 S.Ct. 1966, 1970, 36 L.Ed.2d 736 (1973); Bassett v. Smith, 5 Cir., 1972, 464 F.2d 347, 349. The "certainty and frequency" of the prejudice the new rule is designed to eliminate are important determinants of the appropriateness of retroactivity. Stovall v. Denno, 388 U.S. 293, 299, 87 S.Ct. 1967, 1971, 18 L.Ed.2d 1199 (1967); Juelich v. United States, 5 Cir., 1968, 403 F.2d 523. *See* DeStefano v. Woods, 392 U.S. 631, 634, 88 S.Ct. 2093, 2095, 20 L.Ed.2d 1308 (1968).

In the present case, the purpose of the new rule unquestionably is to enhance the reliability of the fact-finding process. Nothing could be more subversive of that process than a practice that compromises the presumption of innocence. Nor need we speculate about the certainty and frequency of the prejudice associated with this error.

[5] In Brooks v. Texas, *supra*, we declared trial in prison garb to be "inherently unfair." This conclusion is consistent with the view that whether a practice is, in a legal sense, prejudicial must be determined in light of both the individual's interest in an accurate determination of guilt or innocence and the state's interest in an efficient criminal justice system unburdened by excessive delay or complication.

For example, physical restraints on a defendant are permissible only when necessary to prevent injury to bystanders, escape, or disorder at trial. Odell v. Hudspeth, 10 Cir., 1951, 189 F.2d 300, 302. Like trial in prison garb, this practice adversely affects the accuracy of the fact-finding process, because it may prejudice the jury against the defendant. Odell v. Hudspeth, *supra*, 189 F.2d at 302. The use of restraints is not "inherently unfair," however, because the adverse effect may be an unavoidable consequence of protecting

an important state interest—such as safety in the courtroom. Therefore, the defendant must show that the practice was prejudicial in his case—that is, was not necessary to protect an important state interest. *See* Gregory v. United States, 8 Cir., 1966, 365 F.2d 203, 205; Way v. United States, 10 Cir., 1960, 285 F.2d 253, 254; Hardin v. Estelle, W.D.Tex., 1973, 365 F.Supp. 39, 46–47. *See generally* Lane v. Warden, 4 Cir., 1963, 320 F.2d 179, 186.

[6] Trial in prison garb, in contrast to use of physical restraints, does not serve a legitimate state interest. The state has advanced no reason for denying a defendant's request for his available civilian clothes. The certainty and frequency of the prejudice need not be measured. The practice in question is also prejudicial because it is unnecessary.[5] Thus the purpose of the rule announced in *Hernandez* strongly supports retroactivity.

The second factor—the extent of reliance by law enforcement officials—also points toward retroactivity. In almost every case in which the Supreme Court has refused to apply constitutional rules of criminal procedure retroactively, the new rule was announced in a case overruling clear, well-established precedent. *See* Williams v. United States, *supra*, 401 U.S. at 648, 91 S.Ct. at 1150; Desist v. United States, *supra*, 394 U.S. at 250, 89 S.Ct. at 1034; DeStefano v. Woods, *supra*, 392 U.S. at 634, 88 S.Ct. at 2095; Stovall v. Denno, *supra*, 388 U.S. at 299, 87 S.Ct. at 1971; Johnson v. New Jersey, *supra*, 384 U.S. at 731, 86 S.Ct. at 1780; Tehan v. Shott, *supra*, 382 U.S. at 411, 86 S.Ct. at 462; Linkletter v. Walker, *supra*, 381 U.S. at 630, 85 S.Ct. at 1738; Pruett v. State of Texas, *supra*, 470 F.2d at 1184. The Court has never refused retroactive application where the condemned practice had not received at least substantial support from prior rulings. *See* Adams v.

5. In this case, as in *Hernandez*, the defendant was presented in prison clothes because he failed to post bond. A different result may be appropriate where the defendant is on trial for an offense allegedly committed while he was in prison, because the jury would learn of his incarceration in any event.

Illinois, 405 U.S. 278, 283–284, 92 S.Ct. 916, 920, 31 L.Ed.2d 202 (1972); Gosa v. Mayden, 413 U.S. 665, 682, 93 S.Ct. 2926, 2932, 37 L.Ed.2d 873 (1973) (plurality opinion); Michigan v. Payne, 412 U.S. 47, 56, 93 S.Ct. 1966, 1971, 36 L.Ed.2d 736 (1973). Reliance on a blank slate is not enough. *But see* Bassett v. Smith, 5 Cir., 1972, 464 F.2d 347, 351. Even where the condemned practice has found support in lower court decisions or Supreme Court dicta, new rules have been applied retroactively if their effect on trial accuracy is substantial and they do not greatly burden the administration of justice. *See* Witherspoon v. Illinois, *supra*, 391 U.S. at 523 n. 22, 88 S.Ct. at 1777; Roberts v. Russell, 392 U.S. 293, 295, 88 S.Ct. 1921, 1922, 20 L.Ed.2d 1100 (1968). *See generally* Robinson v. Neil, 409 U.S. 505, 510, 93 S.Ct. 876, 879, 35 L.Ed.2d 29 (1973).

Addressing the question of retroactivity in a more general context, the Supreme Court has concluded that to be applied prospectively only, a decision must "establish a new principle of law either by overruling clear past precedent on which litigants may have relied . . . [citations omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . ." [Citations omitted.] Chevron Oil Co. v. Huson, 404 U.S. 97, 106, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971). Even by this stricter standard, the case for retroactivity is strong. *Hernandez* overruled no precedents—clear or otherwise—and was unmistakably foreshadowed in Brooks v. Texas, *supra*. *See* Berger v. California, 393 U.S. 314, 315, 89 S.Ct. 540, 541, 21 L.Ed.2d 508 (1969).

[7, 8] The third factor, the effect retroactivity might have on the administration of justice, was ably analyzed by the district court. Each case of trial in prison garb is to be evaluated on its own facts, Hollins v. Beto, *supra*, 467 F.2d at 952,[6] and in habeas proceedings the petitioner bears the bur-

6. Since *Hernandez*, the district courts have not been hesitant to deny habeas petitions based on trial in prison garb where the evidence of guilt satisfied the harmless error test. *See, e. g.* Bates v. Estelle, S.D.Tex., 1973, 360 F.Supp. 1278.

den of proving the error occurred. Swain v. Alabama, 380 U.S. 202, 226–227, 85 S.Ct. 824, 839–840, 13 L.Ed.2d 759 (1965); Richardson v. State of Texas, 5 Cir., 1970, 425 F.2d 1372, 1373; Scott v. Walker, 5 Cir., 1966, 358 F.2d 561, 571. The number of new trials made necessary by the new rule must also be evaluated in light of the standard by which the error of presenting a defendant in prison garb is to be reviewed, as announced in Hernandez v. Beto, *supra*:

> Before "a federal constitutional error can be held harmless the court must be able to declare a belief that it was harmless beyond a reasonable doubt." [quoting Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967)].

Such a belief is warranted if the reviewing court finds overwhelming evidence in support of the verdict. Harrington v. California, 395 U.S. 250, 254, 89 S.Ct. 1726, 1728–1729, 23 L.Ed.2d 284 (1969).

III. Whether the Error Was Harmless

[9] The jury could have found petitioner (1) not guilty, (2) guilty of assault with intent to kill with malice aforethought, or (3) guilty of assault with intent to kill without malice. We find the evidence of malice aforethought and of intent to kill insufficient to sustain the conviction under the standard promulgated in *Chapman* and *Harrington*, *supra*.

The record shows that petitioner Williams went to an apartment owned by his former landlord, Ray Neatherlin, intending to visit Kay Tolley, a tenant he had known there. The occupants of a neighboring apartment told Williams that Tolley was at Neatherlin's apartment, and he said he would wait with them for her to return. The circumstances of his arrival thus do not suggest any malice or intent to kill on petitioner's part at that point. Indeed, he appears to have tried to avoid any confrontation with Neatherlin by not going to his apartment.

The only evidence of any hostility between Williams and Neatherlin was the unelaborated hearsay statement of Kay Tolley, testified to by Neatherlin, that Williams had come there to cause trouble.

Neatherlin accompanied Kay Tolley to her apartment after asking Bill Stacy, a friend living in the neighboring apartment, to come along. Stacy picked up a pistol and joined the other two. When the three arrived, Williams, who had been chatting with the neighbors on their front porch, approached them. He said hello to Kay Tolley, and Neatherlin demanded compensation for some bad checks allegedly tendered as payment of rent Williams allegedly owed from his prior tenancy. Williams stated he owed nothing, and Neatherlin then demanded he pay the cost of cleaning up the apartment he had occupied, which Neatherlin claimed had been filthy. Williams refused, and Neatherlin ordered him off the property at once.

At this point there was no indication that Williams was about to participate in an affray. One witness testified he looked angry, and there was some indication he approached Tolley and Neatherlin with his hand cupped, perhaps as if holding a knife. No one saw the knife, however, until the very end of the fight. Therefore, if malice and intent to kill are to be inferred, they can be inferred only from the circumstances of the fight.

Williams faced a heavier opponent who was accompanied by an armed ally. Although Stacy testified the pistol was stuck in the back of his trousers, Williams testified at the federal habeas hearing that it was in Stacy's front pocket and clearly visible to him. The fight itself lasted about three minutes. Neither man pressed an advantage. Each time Williams was knocked down, Neatherlin, who never left his feet during the fight, waited for him to get back up. At trial Neatherlin referred to the incident as a "little run-in."

Several plausible theories may explain Williams' assault on Neatherlin: fear that Neatherlin and Stacy would resort to physical force to collect Neatherlin's debt claim; anger at

being accused of passing bad checks (Williams was not the maker of the checks) and accused of being filthy, and at being ordered to leave, embarrassed before his friends. However, a malicious intent to kill is also a plausible explanation for the assault—perhaps even the most plausible one. The evidence for that explanation is not so overwhelming that we can hold harmless the error of trying Williams in prison garb.

Another source of evidence of malice and intent to kill is the extent of Neatherlin's injuries. The principal testimony on this question was Neatherlin's self-serving statements and a remark by the arresting officer, who arrived on the scene a few minutes after the fight ended and testified that Neatherlin had "several lacerations." No medical records or physicians' reports were introduced. Neatherlin himself claimed he had received a stab wound in the chest as deep as the length of the knife blade itself (several inches), several foot-long gashes, and a stomach wound so serious that his intestines were hanging out. Yet he admitted he did not even know he had been cut until Stacy yelled that Williams had a knife and stepped in to stop the fight.

Our view of the evidence bears comparison with the facts in Hernandez v. Beto, *supra*. In that case the pivotal question was whether the defendant was intoxicated. Although three policemen, three children, and an adult testified that they could smell alcohol on the defendant, that he staggered, and that his eyes were blurred and misty, the Court concluded the evidence was insufficient to render harmless the error of trying the defendant in prison garb. *Cf.* Thomas v. Beto, 5 Cir., 1973, 474 F.2d 981, 983, with Smith v. Estelle, 5 Cir., 1974, — F.2d —. The evidence in this case is not so strong as to warrant the conclusion that the constitutional error of trying Williams in prison garb was harmless.

The cause is remanded with directions to grant the writ of habeas corpus and to discharge petitioner, unless the State elects to retry him within a reasonable time.

Reversed and remanded.

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APPENDIX "B"

Harry Lee WILLIAMS, Petitioner,

v.

Dr. George J. BETO, Director, Texas Department of Corrections, Respondent

Civ. A. No. 72-H-432

United States District Court,
S. D. Texas,
Houston Division.
Oct. 2, 1973

Petition by state prisoner for habeas corpus. The District Court, Carl O. Bue, Jr., J., held that the trial of a prisoner in jail clothing is inherently prejudicial, that Fifth Circuit case of Hernandez v. Beto would have retroactive effect and that the trial of the prisoner in jail clothing was harmless error in view of the strong evidence of guilt of assault to murder with malice and the lack of factual basis which could bring the prisoner within range of the lesser included offense of assault without malice.

Petition denied.

1. Habeas Corpus - 85.5(11)

Evidence adduced in state prisoner's habeas corpus proceeding established that there was no ineffective assistance of counsel at prisoner's state trial.

2. Criminal Law - 633(1)

It is inherently unfair in a jury trial to try a criminal defendant who is dressed in jail or pri-

son clothing, as such action infringes upon the fundamental right of the presumption of innocence.

3. Criminal Law - 633(1)

Where defendant is on trial for a prison offense against a fellow inmate in an environment where prison clothing is the normal attire, there is no prejudice for the jury to see that which is already known and defendant may be tried in prison clothing.

4. Habeas Corpus - 25.1(4)

The fact that a defendant is tried in jail clothing for nonprison offense does not, standing alone, compel a new trial; if trial counsel intended to use jail clothing as a tactic to gain sympathy with the jury, no reversal is warranted.

5. Criminal Law - 660

A defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error.

6. Criminal Law - 660

Mere fact that no objection to being tried in jail clothing was raised does not compel, or permit, termination of judicial inquiry into the claimed harm.

7. Criminal Law - 660

In the absence of showing in the record of express waiver or showing that trial counsel willingly intended to extract some tactical benefit by

having the defendant tried in jail clothes, there must be judicial determination as to whether there was voluntary waiver of the right, even if the defendant failed to object.

8. Criminal Law - 660

A judicial determination as to whether there was voluntary waiver of right not to be tried in prison or jail clothing must be based on reading of the record and on what seems to have been the probable impact of the prison clothing upon the mind of an average jury.

9. Criminal Law - 1162

Before constitutional error can be held to be harmless, the court must be able to conclude that such error was harmless beyond reasonable doubt.

10. Criminal Law - 1162

If all of the facts lead unerringly to guilt, and no possible inference clouds or conflicts with any essential or material fact, then an error is harmless beyond reasonable doubt.

11. Criminal Law - 1186.1

If the jury could have believed by even "bare possibility" facts favorable to the defendant that are inconsistent with their verdict, or if the verdict carries a seed of reasonable doubt as to harm, then it is the duty of the reviewing court to reverse the conviction.

12. Courts - 100(1)

Primary criteria to be considered in determining whether to apply a particular rule retroactively are the purpose to be served by the new standard, the extent of the reliance by law enforcement authority upon old standards and the effect on the administration of justice of retroactive application of new standard.

13. Courts - 100(1)

The rule of the Fifth Circuit case of Hernandez v. Beto which found it inherently unfair for a criminal defendant to be tried in jail clothing would be given retroactive application.

14. Habeas Corpus - 25.1(4)

The fact that a defendant was tried in jail clothes does not per se automatically compel the granting of immediate relief following a habeas corpus hearing but does require judicial scrutiny to insure that the petitioner's criminal trial contains no constitutional deprivations.

15. Criminal Law - 660

In view of common practice in Harris County, Texas, of trying defendants in jail clothes, fact that defendant might have asked deputy sheriff to be tried in civilian clothing, and, upon denial, thereafter failed to raise the matter with counsel or the trial court did not constitute a waiver of right to be tried in civilian clothing.

16. Habeas Corpus - 25.1(4)

In view of strong evidence in state trial which resulted in conviction of assault to murder with malice and lack of evidence that would bring defendant within the lesser offense of assault without malice, the trial of the state prisoner in jail clothes was harmless error. Vernon's Ann. Tex.P.C. art. 1160.

Ben L. Aderholt, Houston, Tex., for petitioner.

John L. Hill, Atty. Gen. of Texas, Joe B. Dibrell, E. Bruce Curry, Asst. Attys. Gen., Austin, Tex., for respondent.

MEMORANDUM AND OPINION

CARL O. BUE, Jr., District Judge.

This petition for a writ of habeas corpus is one of two applications before this Court based upon the same legal issue: the effect of a trial in jail clothing upon a conviction. Consecutive evidentiary hearings were held in this and in a companion case, Dennison v. Beto, Civil Action No. 70-H-702. Both petitions stem from criminal trials conducted in Harris County, Texas, and involve consideration of the alleged local practice of trying certain defendants in jail clothing.

THE FACTUAL BACKGROUND

Petitioner Williams was tried in the 177th District Court of Harris County, Texas, in November, 1970, for assault to murder in connection with

a knifing incident in which he inflicted severe wounds on his ex-landlord. The petitioner was convicted by a jury of assault to murder with malice; he was sentenced to ten years by the Honorable Miron A. Love, confinement to be not less than two years nor more than ten. The conviction was affirmed in a written opinion on appeal. Williams v. State, 477 S.W.2d 24 (Tex.Cr.App. 1972). The specific issues before this Court, ineffective assistance of counsel at the state trial and trial in jail clothes, were decided adversely to petitioner on direct appeal. For reasons outlined hereafter, it is important to comprehend the gravity of the circumstances surrounding the offense as extracted primarily from the transcript of the state trial.

On May 29, 1970, a fight took place between the petitioner and one Ray Neatherlin, the landlord of an apartment complex on East 7th Street in Houston, Texas. The petitioner had previously been a resident of this complex and had been asked to move out as a consequence of some unspecified difficulty. (Transcript at 142). At the time of the incident at issue, the landlord was 58 years old (Tr. 129) and weighed approximately 200 to 215 pounds (Tr. 125). The petitioner was approximately 64 years of age (Tr. 237) and was characterized by defense counsel as being of "frail body" (Tr. 17). A witness to the incident stated that the landlord was larger, more robust and physically stronger than the petitioner (Tr. 194). The landlord was not called as a witness before this Court at the petitioner's evidentiary hearing, but both men were present before the jury at the state trial.

The petitioner had gone to the apartment complex to visit a Mrs. Kay Tolley who was a wit-

ness to the fight. She did not testify at the trial, as she had moved out of state. Neighbors and subsequent trial witnesses were sitting outside of their apartments nearby, and they advised the petitioner that Mrs. Tolley was at the landlord's apartment. The petitioner awaited her return with the neighbors. The landlord testified that Mrs. Tolley was at his apartment to pay her rent and that she had told him the petitioner had returned to cause trouble (Tr. 200). The landlord promptly left his apartment to speak to the petitioner and also to inquire about certain allegedly bad checks used by petitioner to pay his rent while still living there (Tr. 113-14).

As the landlord left his apartment, he called to a neighbor, Bill Stacy, to accompany him (Tr. 133). The tone in the landlord's voice was evidently such that Stacy, expecting trouble, grabbed his pistol and stuck it in the back of his trousers as he hurried to accompany the landlord (Tr. 140-41). Mrs. Tolley and the two men reached the petitioner at about the same time (Tr. 170), Stacy testifying that he was only about a step behind the landlord (Tr. 149). The petitioner was described as appearing nervous upon seeing the landlord, and he put his hand into his right pocket and fumbled around a bit (Tr. 170-71, 185). He stepped forward to meet the landlord, his hand reportedly "cupped" (Tr. 171). The landlord characterized the petitioner's attitude as being belligerent (Tr. 117).

Words were exchanged over the checks with the petitioner denying that he owed anything (Tr. 115-16). The landlord then asked petitioner to leave (Tr. 116). Stacy testified that he quickly realized that a man-to-man confrontation was about to take place, so he assumed the role of ensuring that no one else

interfered (Tr. 149, 152). The fight began when the petitioner jumped or first moved toward the landlord, striking or pushing at his neck (Tr. 117, 143, 172, 186) and continued for several minutes (Tr. 150, 174, 189) with considerable pushing, scuffling and hitting taking place (Tr. 150, 177, 190). Although the petitioner was apparently knocked down by the landlord several times, he only received a few marks and scratches (Tr. 161) and exhibited no signs of facial swelling according to the arresting police officer (Tr. 195-99). The petitioner repeatedly got up and hit the landlord (Tr. 176, 179). The landlord stated that the petitioner repeatedly tried to get in close and clinch with him (Tr. 92); Stacy stated much the same thing (Tr. 144). Only after the fight had continued for a period of time did Stacy realize that the petitioner had a knife. Stacy then pulled his gun on the petitioner, yelled a warning to the landlord (Tr. 146) and stopped the fight. At the trial witnesses testified the petitioner had been fighting with his hand cupped (Tr. 171, 186), and Stacy characterized the petitioner as appearing to be an experienced knife fighter (Tr. 144-45).

The landlord was badly cut. His testimony (Tr. 117, 119-22, 132) and that of Stacy (Tr. 146) indicate that the landlord had been cut in the throat, stabbed in the chest, cut three times over the heart and once in the stomach causing his intestines to hang out. He was taken to a hospital where he received a total of 58 stitches, his condition being listed as "critical" (Tr. 120).

THE EVIDENTIARY HEARING

At the habeas corpus evidentiary hearing held in this Court, counsel for petitioner offered

evidence in affidavit form from the Clerk of the 177th District Court that during the months of October and November, 1970, there were a total of six "jail cases", i.e., defendants not released on bond, tried before juries in Judge Miron A. Love's court of which petitioner's case was one. Counsel for petitioner also introduced depositions upon written questions taken in compliance with Fed.R.Civ.P. 31 wherein counsel for each of the five remaining "jail cases" testified that to the best of their knowledge their clients had been tried in jail clothes.

Counsel for respondent introduced several exhibits, including an affidavit from the Honorable Miron A. Love which in pertinent part recited:

> I have been asked about my policy in regard to defendants who were tried in jail clothing. I can state unequivocably that if at any time a defendant or his attorney made known to me either before or during the trial that he did not wish to be tried in jail clothing, I would have granted his request, and permitted him time to obtain civilian clothing to wear at his trial.
>
> . . . on numerous occasions I have granted requests by defendants or their attorneys for them to be allowed to obtain civilian clothes to wear at their trials. I have never compelled a defendant to go to trial in jail clothes, and on every occasion when a defendant or his attorney requested that he be allowed to wear civilian clothes at his trial I have granted the request.

Recognition of this policy was acknowledged by

James Skelton, the district attorney who prosecuted petitioner at his state trial and who was a witness at this Court's evidentiary hearing. To the same effect was an affidavit obtained from one of the defense attorneys questioned by petitioner's counsel which was introduced into evidence.

Mr. Chester Darnell, defense counsel for petitioner at the state trial, testified at the evidentiary hearing that to his knowledge and belief all non-bailed defendants were tried in jail garb at that time. He testified that he never raised an objection to trial in jail clothes because a similar objection had been denied by the Honorable Wendell Odom, then a state district judge in Harris County, and counsel felt that such an objection before Judge Love would be denied as well. Counsel was unaware of Judge Love's practice as set forth above. The petitioner testified before this Court that he explicitly asked one Captain Cleveland, a Deputy Sheriff, to permit him to change clothes before his state trial, but the request was denied. He did not thereafter raise the issue with attorney Darnell or before Judge Love.

Attorney Darnell's general trial strategy in the state trial had been to try to raise the issue of self defense, but he had been unsuccessful because the petitioner would not take the stand. Darnell had conferred with the petitioner on several occasions prior to trial and had reviewed the case and evidence with the prosecutor. He had apprised the petitioner of the difficulties in the case and the progress of the trial, but the petitioner had continued to refuse to testify.

Former District Attorney Skelton testified

at the evidentiary hearing that, as an experienced criminal lawyer, he would have kept the petitioner off the stand. He characterized the evidence in the case against the petitioner as highly favorable for the prosecution. He also testified that following the state trial he had ascertained that the jury was affected primarily by three factors: (1) the severity of the injuries inflicted upon the landlord; (2) the fact that the petitioner had wielded the knife like an experienced knife fighter; and (3) the fact that the victim was the landlord seeking to remove the petitioner from his own premises.

THE LEGAL ISSUES

INEFFECTIVE ASSISTANCE OF COUNSEL

(1) While the issue of ineffective assistance of counsel is present in this case, it is not relied upon heavily by petitioner. Nor should it be. This Court has reviewed the record in its entirety, and it is apparent that defense counsel in the state criminal trial rendered reasonably effective legal representation. Any reliance upon studied hindsight to discern possible alternatives in trial strategy can only be viewed as counter productive, particularly in the light of the assessment of the case rendered by the district attorney handling the prosecution. This Court is persuaded that there was no ineffective assistance of counsel.

THE EFFECT OF PETITIONER'S TRIAL IN JAIL CLOTHES ON THE PRESUMPTION OF INNOCENCE

This issue is not so readily resolved. Indeed, the effect on a defendant's presumption of

innocence when tried in jail or prison clothes does not appear to have been extensively litigated in the state courts outside of Texas. See, e. g., 21 Am.Jur. 2d Criminal Law Sec. 239 (1965). A thorough review of federal cases suggests that the issue has been considered only occasionally outside of the Fifth Circuit in general and the federal district courts in Texas in particular. See, e. g., Watt v. Page, 452 F.2d 1174 (10th Cir. 1972), cert. denied, 405 U.S. 1070, 92 S.Ct. 1520, 31 L.Ed.2d 803; Moye v. State of Georgia, 330 F.Supp. 290 (N.D.Ga. 1971); Hall v. Cox, 324 F.Supp. 786 (W.D.Va. 1971); McFalls v. Peyton, 270 F.Supp 577 (W.D.Va. 1967), aff'd, 401 F.2d 890 (4th Cir.); United States v. Social Service Dept., 263 F.Supp 971 (ED.Pa. 1967).

THE FIFTH CIRCUIT CASES

To date the Fifth Circuit Court of Appeals appears to have considered this issue in one form or another on eight occasions. In order of release, the opinions are as follows: Brooks v. State, 381 F.2d 619 (5th Cir. 1967); Hernandez v. Beto, 443 F.2d 634 (5th Cir. 1971), cert. denied, 404 U.S. 897, 92 S.Ct. 201, 30 L.Ed.2d 174; Garcia v. Beto, 452 F.2d 655 (5th Cir. 1972); United States v. Fideler, 457 F.2d 921 (5th Cir. 1972); Goodspeed v. Beto, 460 F.2d 398 (5th Cir. 1972); Hollins v. Beto, 467 F.2d 951 (5th Cir. 1972); United States ex rel. Stahl v. Henderson, 472 F.2d 556 (5th Cir. 1973); Thomas v. Beto, 474 F.2d 981 (5th Cir. 1973).

(2) In this Circuit it has been held that it is inherently unfair to try a criminal defendant who is dressed in jail or prison clothing, as such action infringes upon the fundamental right of the presumption of innocence. Hernandez v. Beto, supra, 443

F.2d at 636-637; Brooks v. State, supra, 381 F.2d at 624. It, is the trial in such clothing before a jury which is improper, since the possibility exists that such attire subtly and subconsciously can influence their deliberations. As the Court in Brooks emphasized:

> No insinuations, indications or implications suggesting guilt should be displayed before the jury, other than admissible evidence and permissible argument.

381 F.2d at 624. Along the same lines a Pennsylvania district court has stated that:

> . . . the critical element appears to be display of the defendant before the jury in a fashion that will allow them to be swayed by his appearance as an already convicted criminal.

United States v. Social Service Dept., 263 F.Supp. 971 (E.D.Pa. 1967).

(3) It is not the wearing of civilian clothing in which the defendant may have been incarcerated, or the fact that the defendant at his trial was not dressed in coat and tie before the jury as were other trial participants which constitutes possible prejudice. United States v. Fideler, supra, 457 F.2d at 922; Moye v. Georgia, supra, 330 F.Supp. at 292. Indeed, under some circumstances trial in prison clothing is not inherently prejudicial. For example, when a defendant is on trial for a prison offense against a fellow inmate in an environment where such clothing is the normal attire, there is no prejudice for the jury to see that which is already

known. United States ex rel. Stahl, supra, 472 F.2d at 557.

(4-7) The fact that a defendant is tried in jail clothing for a non-prison offense does not, standing alone, compel a new trial. Garcia v. Beto, supra, 452 F.2d at 655. If trial counsel intended to use jail clothing as a tactic to gain sympathy with the jury, no reversal is warranted. Id. at 656. As the Fifth Circuit Court of Appeals has noted, "(a) defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error." Hernandez v. Beto, supra, 443 F.2d at 634 (on petition for rehearing) (emphasis added). The reason for this rule has been definitively stated by the Tenth Circuit Court of Appeals:

> In several of the cited cases reference is made to the possibility that the attorney and the defendant there concerned may have wanted the accused tried in jail uniform on some theory that this would be to the advantage of the accused . . . . This matter of possible trial strategy is a factor which should be considered by the trial court . . . because the petitioner, of course, cannot deliberately create a condition for an expected advantage and, failing that, urge it as error. A deliberate purpose to be so tried may be found from the failure to object to trial in jail clothing unless the trial court is persuaded that the lack of objection resulted from circumstances that unfairly caused the defendant to forego an objection or to request to be tried in other clothing. These must be circumstances which were not a part of trial strategy.

Watt v. Page, 452 F.2d 1174, 1176-1177 (10th Cir. 1972), cert. denied, 405 U.S. 1070, 92 S.Ct. 1520, 31 L.Ed.2d 803. However, the mere fact that no objection was raised does not compel, or permit, termination of judicial inquiry into the claimed harm. In both Brooks and Hernandez, for example, no objections were made by counsel. In the absence of a showing in the record of express waiver or a showing that trial counsel "willingly" intended to extract some tactical benefit by having the defendant tried in jail clothes, there must be a judicial determination as to whether or not there was a voluntary waiver of the right, even if the defendant failed to object. Hollins v. Beto, supra, 467 F.2d at 952; Goodspeed v. Beto, supra, 460 F.2d at 400.

(8-11) A judicial determination must be based on a reading of the record and on what seems to have been the probable impact of the prison clothing upon the minds of an average jury. Before a constitutional error can be held to be harmless, the court must be able to conclude that such error was harmless beyond a reasonable doubt. Hernandez v. Beto, supra, 443 F.2d at 637. See also Noble v. Beto, 325 F.Supp. 607, 608 (S.D.Tex. 1971) ("evidence of guilt . . . is so strong that the error thus committed is harmless."); Bates v. Estelle, 360 F. Supp. 1278, 1281 (S.D.Tex. 1973) ("the probable impact (on the jury) . . . was harmless beyond a reasonable doubt.") If all of the facts lead unerringly to guilt, and no possible inference clouds or conflicts with any essential or material fact, then the error is harmless beyond a reasonable doubt. Thomas v. Beto, supra, 474 F.2d at 983. To paraphrase Thomas, if the jury "could have believed" by even a "bare possibility" facts favorable to the defendant that are inconsistent with their verdict, or if the

verdict carries a "seed of reasonable doubt as to harm", then it is the duty of the reviewing court to reverse the conviction. Id. at 983.

THE TEXAS CASES

This Court has reviewed as well the published opinions of the Texas courts. In general, these courts appear to be in accord with the basic principle espoused in Hernandez, as it has been stated that "every effort should be made to avoid trying an accused while in jail garb." Barber v. State, 477 S.W. 2d 868, 869 (Tex.Cr.App. 1972); Ring v. State, 450 S.W.2d 85, 88 (Tex.Cr.App. 1970). Trial in jail clothes has also been the cause of reversed convictions at the state level. See, e. g., Ex Parte Slaton, 484 S.W.2d 102 (Tex.Cr.App. 1972); Ephraim v. State, 471 S.W.2d 798 (Tex.Cr.App. 1971). However, several courts appear to have avoided the issue of prejudice by holding that reference in a trial transcript to the defendant being dressed in a "white suit" or "white coveralls" was insufficient to raise the issue of trial in jail clothes, notwithstanding the allegations of the defendant. See, e. g., Simmons v. State, 480 S.W.2d 633, 634 (Tex.Cr.App. 1972); Pratt v. State, 474 S.W.2d 243, 245 (Tex.Cr.App. 1971); Ellis v. State, 468 S.W.2d 406, 408 (Tex.Cr. App. 1971). None of the foregoing cases considered whether it was a common practice in the convicting court or jurisdiction at the time to try defendants in jail clothes.

The majority of the reported Texas cases appear to place particular emphasis when denying relief on the failure of the defendant or counsel to make formal objection to a trial in jail clothes. See, e. g., Ex Parte Kelly, 484 S.W.2d 773, 774 (Tex.Cr.

App. 1972); Simmons v. State, supra, 480 S.W.2d at 634; Barber v. State, 477 S.W.2d 868, 870 (Tex. Cr.App. 1972); Williams v. State, 477 S.W.2d 24, 26 (Tex.Cr.App. 1972); Wilkinson v. State, 423 S.W.2d 311, 312 (Tex.Cr.App. 1968). In none of these cases does it appear that judicial inquiry was made concerning voluntary waiver by the defendant or his counsel. Such an approach would appear to be insufficient under present federal standards. See Hollins v. Beto, 467 F.2d 951, 952 (5th Cir. 1972).

RETROACTIVITY

With respect to jail clothes cases tried before Hernandez, such as the present case before this Court, the retroactive application of this new constitutional doctrine is not clear. On two occasions the Fifth Circuit Court of Appeals has had the opportunity, but has not seen fit to decide the question. Goodspeed, supra, 460 F.2d at 400; Thomas, supra, 474 F.2d at 981 n. 1. On the other hand, the Texas courts have taken the position that it should be applied retroactively. Ex parte Slaton, 484 S.W.2d 102, 104-105 (Tex.Cr.App. 1972); Ephraim v. State, 471 S.W.2d 798 (Tex.Cr.App. 1971).

(12) Three primary criteria generally have been considered by the United States Supreme Court in determining whether to apply a particular rule retroactively. They are: (1) the purpose to be served by the new standard; (2) the extent of the reliance by law enforcement authority upon old standards; and (3) the effect on the administration of justice of a retroactive application of the new standard. See Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 18 L.Ed.2d 1199, 1203 (1967). See also, Annot., 22 L.Ed.2d 821, 825 (1970); Annot., 14

L.Ed.2d 992 (1966). In a recent district court decision the Supreme Court pronouncements concerning retroactivity have been fully analyzed and summarized; this Court will not duplicate this analysis here. Woodall v. Keller, 337 F.Supp. 595, 597-598 (D.Md. 1972), rev'd, 465 F.2d 49 (4th Cir. 1972). As the Supreme Court has stated:

> Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances.
>
> It is quite different where the purpose of the new constitutional standard proscribing the use of certain evidence or a particular mode of trial is not to minimize or avoid arbitrary or unreliable results but to serve other ends. In these situations the new doctrine raises no question about the guilt of defendants convicted in prior trials.
>
> (Footnotes omitted; emphasis added)

Williams v. United States, 401 U.S. 646, 653, 91 S.Ct. 1148, 1152, 28 L.Ed.2d 388, 395 (1971). See also Robinson v. Neil, 409 U.S. 505, 93 S.Ct. 876, 35 L.Ed. 2d 29 (1973).

(13) Considering the first of the three criteria noted above, that is, the purpose to be served by the new standard, it is apparent that a key inquiry in determining retroactivity is the effect which the denial of rights or procedures subsequently ruled to be constitutionally mandated might have on the accuracy of the guilt determining process in prior trials. One court in the Southern District of Texas has already considered this question. In Woodrow Wilson Smith v. Beto, Civil Action 71-H-830, at 5 (S.D.Tex., filed May 24, 1972) the test of Hernandez was held to be fully retroactive, it being observed therein that "trial of a defendant in jail clothes penetrates to the very core of due process". Taking into consideration the position of the Texas courts as well as that expressed in Smith, supra, it would appear that retroactive application of Hernandez serves a valid purpose which satisfies this Supreme Court requirement.

The second factor, reliance upon old standards, is not an issue here, as it does not appear that law enforcement authorities at times material to this particular trial were relying upon any particular standard.

(14) The third criterion, the effect of retroactivity upon the administration of justice, is of some concern to this Court and merits exposition. Counsel for the respondent suggest that a retroactive application of the Hernandez rule would open the prison gates and precipitate the release of untold numbers of criminals. This Court has taken note of the evidence which clearly indicates that prior to Hernandez the majority of defendants who were unable to meet bail in Harris County were, in fact, tried in jail clothes. While the argument can be

made that no substantial impairment of the truth finding function of a criminal trial ever resulted from the prosecution of a defendant in jail clothes since that was the generally accepted practice at the time, the fact remains that such a trial is now viewed in this Circuit as inherently unfair and infringing upon the fundamental right of the presumption of innocence. Hernandez v. Beto, supra, 443 F.2d at 636-637; Brooks v. State, supra, 381 F.2d at 624. However, safeguards against any such potential mass release of prisoners are readily apparent. Each case must be evaluated on its own facts. Hollins v. Beto, 467 F.2d 951, 952 (5th Cir. 1972); Hernandez, supra. The fact that a defendant was tried in jail clothes does not per se automatically compel the granting of immediate relief following a habeas corpus hearing such as this one in which the issue is raised. It does require judicial scrutiny to insure that a defendant's criminal trial contains no constitutional deprivations. The possible application of the doctrine of harmless error as evaluated on a case-by-case basis affords ample protection so as to preclude any significant adverse effect upon the administration of justice. Last of all, the burden of proof upon a petitioner in a habeas corpus evidentiary hearing remains intact. Swain v. Alabama, 380 U.S. 202, 227, 85 S.Ct. 824, 13 L.Ed.2d 759, 776 (1965); Hairston v. Alabama, 465 F.2d 675, 677 (5th Cir. 1972); Richardson v. Texas, 425 F.2d 1372, 1373 (5th Cir. 1970). Thus, when measured against the totality of the enunciated Supreme Court standards, the rule of Hernandez passes muster and should be applied retroactively.

CONCLUSION

It is clear from the record in this case and

consistent with the evidence adduced in Dennison, the companion case, that prior to Hernandez there did exist a common practice in Harris County courts to try incarcerated defendants in jail clothing unless they were able to secure some dispensation. The clothing worn varied somewhat, but generally consisted of a white T-shirt with "Jail" or "Harris County Jail" printed on the back, a pair of trousers (white, khaki, or blue jeans) on which the same or similar words were printed in white letters, and, generally, a pair of shower clogs.

(15) There is no doubt but that the Honorable Miron Love had a practice of allowing defendants to stand trial in civilian clothing, if requested, a practice evidently followed by certain of the other judges as well. See Ex Parte Kelly, 484 S.W.2d 773, 774 (Tex.Cr.App. 1972). However, the record does not reveal that Judge Love's practice was publicly known or that it was known to defendants or their counsel. More reasonably, at times material to the petitioner's criminal trial it was the standard practice to have all defendants in custody dressed alike without any policy such as that employed by Judge Love being uniformly adopted by all or even a majority of the criminal district judges in Harris County. Instead, the evidence points to the strong likelihood that the trial climate at that time acted as a natural deterrent to the raising of objections to what was commonplace--a trial in jail clothes, even assuming that defendants or their counsel thought about the problem and considered its legal implications. In the absence of such consideration it can scarcely be concluded that either petitioner in this case or his trial counsel knowingly, willingly and voluntarily waived the right to be tried in civilian clothing. The fact that Williams may have asked

a deputy sheriff to be tried in such clothing and, upon denial, thereafter failed to raise the matter with counsel or the court cannot be viewed as constituting a waiver which satisfies the requirements of this Circuit.

(16) The circumstances surrounding the knifing in this case, all as heretofore set out, are so strong that in this Court's opinion a jury could not have been swayed from a belief of innocence to a finding of guilt because of the defendant's appearance in jail clothes. Whatever harm, if any at all, resulted therefrom was clearly de minimis and squarely fits the doctrine of harmless error beyond a reasonable doubt. Thomas v. Beto, 474 F.2d 981 (5th Cir. 1973); Noble v. Beto, 325 F.Supp. 607 (S.D.Tex. 1971).

A theoretically closer case might be presented with respect to jury consideration of the lesser included offense. The jury was charged in this case that it might find the defendant guilty of assault with intent to murder with malice or guilty of assault with intent to murder without malice. Conviction of the assault with malice carries a possible sentence of 2 to 25 years, whereas the lesser offense of the assault without malice carries a possible sentence of 1 to 3 years. Vernon's Ann. Tex. Penal Code art. 1160 (Supp. 1972-73). (The statute also provides for increased sentences for certain assaults when made with knives, but the state record does not indicate that this provision was considered or employed by the judge.) The court charged the jury that the lesser offense involved "sudden passion arising from an adequate cause" so as to "render the mind incapable of cool reflection". Contrary to the present case, if the material cir-

cumstances could arguably support the contention that the petitioner had experienced an adequate cause so as to be compelled to act by a sudden passion rendering his mind incapable of cool reflection, the possibility exists that a defendant could receive a greater sentence from a jury which was swayed between differing offenses by the presence of the defendant in jail clothes. Such a violation of a defendant's presumption of innocence as to the more serious offense would be constitutionally impermissible under existing law. This Court has carefully screened the record in this case and finds no factual basis which can possibly bring the petitioner within range of the lesser included offense. This being so,

It is the opinion of this Court that the trial of the petitioner in jail clothes, although inherently prejudicial, was nevertheless clearly harmless error beyond a reasonable doubt. Petitioner's application for a writ of habeas corpus must be and is hereby denied.

APPENDIX "C"

Harry Lee WILLIAMS, Appellant,

v.

The STATE of Texas, Appellee.

No. 44545.

Court of Criminal Appeals of Texas.

Feb. 9, 1972.

Rehearing Denied March 22, 1972.

Defendant was convicted in the 177th Judicial District Court, Harris County, Miron A. Love, J., of assault with intent to murder with malice aforethought, and he appealed. The Court of Criminal Appeals, Douglas, J., held that evidence that defendant had pocket knife in his hand while fighting assault victim and that victim was found after fight to have been cut in the throat, stabbed in the chest, cut three times over the heart and once in the stomach, causing partial evisceration, was sufficient from which jury could determine beyond a reasonable doubt that defendant was guilty as charged.

Affirmed.

Morrison, J., did not participate.

1. Criminal Law - 1038 (2, 4)

Where there was no objection in writing or written request for charge on self-defense not given by trial court, matter was not before Court of Criminal Appeals on review even if issue was raised by evidence. Vernon's Ann.C.C.P. arts. 36.14, 36.15.

2. Homicide - 90

A pocket knife is not per se a "deadly weapon" although mode and manner of its use, and wounds inflicted on injured party, are factors in determining character of weapon and the intent to kill.

3. Homicide - 257(4)

Evidence that defendant had pocket knife in his hand while fighting assault victim and that victim was found after fight to have been cut in the throat, stabbed in the chest, cut three times over the heart and once in the stomach, causing partial evisceration, was sufficient from which jury could determine beyond a reasonable doubt that defendant was guilty of an assault with intent to murder with malice aforethought.

4. Criminal Law - 864, 1039

Trial court's use of phrase "there was an intention to kill," in assault with intent to murder prosecution during which court, in response to juror's question, stated that "The charge for the offense is assault with intent to murder with malice aforethought from the indictment and that's all I know about it. There is no death resulting, but there was an intention to kill," although literally appearing to state an opinion, did not do so in context and, in absence of objection at trial to remark, no reversible error was shown.

5. Criminal Law - 1035(3)

Where defendant did not object at or before

trial to being tried in jail clothes, failing to direct that defendant wear something other than county jail clothes during jury trial was not fundamental error.

6. Criminal Law - 641.13(2)

Defense counsel who questioned jury panel extensively on voir dire and cross-examined each of State's witnesses in effort to raise issue of self-defense in assault with intent to murder prosecution did not render ineffective assistance to defendant who complained counsel made only one objection during trial and made no objections to court's charge, introduced no evidence on self-defense and did not subpoena a witness thought necessary by defendant.

Ben L. Aderholt, Houston (Court Appointed on Appeal), for appellant.

Carol S. Vance, Dist. Atty., James C. Brough and James Skelton, Asst. Dist. Attys., Houston, and Jim D. Vollers, State's Atty., Austin, for the State.

OPINION

DOUGLAS, Judge

This is an appeal from a conviction for assault with intent to murder with malice aforethought. Following a jury verdict of guilty, the court assessed the punishment at ten years.

The sufficiency of the evidence is challenged.

On May 29, 1970, appellant went to East 7th Street in Houston to see a Mrs. Kay Tolley. Hearing she was not at home, he awaited her return with some of her neighbors. Eventually Mrs. Tolley appeared followed by her landlord (and appellant's former landlord), Ray Neatherlin. Several steps behind them was Bill Stacy, one of Neatherlin's tenants. Appellant appeared nervous, placed his hand in his right pocket and pulled up his trousers. He approached Neatherlin who asked him for money to cover some "hot checks" (apparently for rent) and accused appellant of leaving his apartment dirty. Appellant denied the accusations. ,Neatherlin told him to either pay his rent or get off his property. Then appellant hit Neatherlin around the neck. During the ensuing fight which lasted several minutes Neatherlin knocked appellant down about three times. Appellant got up each time and "hit" Neatherlin. Then Stacy said: "Ray, look out, I think he's got a knife." Stacy then saw a part of a knife blade in appellant's hand, pulled out a gun and told appellant to drop the knife. Appellant dropped the knife. Stacy then saw that Neatherlin had been "cut all to pieces."

The testimony shows that Neatherlin had been cut in the throat, stabbed in the chest, cut three times over the heart and once in the stomach causing his intestines to hang out. He was taken to the hospital by Stacy where a total of forty-eight stitches were required to repair the cuts.

(1) In his first ground of error, appellant complains that the trial court did not charge the jury on self-defense. Even if the issue of self-defense was raised by the evidence, the matter is not before us for review, because there was no ob-

jection in writing or a written request for such an issue as required by Articles 36.14 and 36.15, Vernon's Ann.C.C.P. Martinez v. State, Tex.Cr.App., 448 S.W.2d 488.

(2, 3) In his second ground of error, appellant contends the evidence was insufficient to prove an assault to murder with malice aforethought. A pocket knife is not per se a "deadly weapon." Barnes v. State, 172 Tex.Cr.R. 303, 356 S.W.2d 679. However, the mode and manner of its use, Richards v. State, 147 Tex.Cr.R. 118, 178 S.W.2d 517, and the wounds inflicted on the injured party, Reed v. State, 149 Tex.Cr.R. 208, 192 S.W.2d 890, are factors in determining the character of the weapon and the intent to kill. The jury had sufficient evidence on these factors to determine beyond a reasonable doubt that appellant had a specific intent to kill Neatherlin. See Samuel v. State, 471 S.W.2d 611 (this day decided).

(4) In a fourth ground of error, appellant complains of a remark made by the trial judge during voir dire examination of the prospective jurors. No objection was made to the statements of the judge, His contention is that the trial judge conveyed to the prospective jurors his opinion of the case when he responded to one of their questions. The judge had just stated to the prospective jurors that it would be the court's responsibility to charge upon the law and their responsibility to apply the facts to the law. When he asked if any juror felt he or she could not do this the following occurred:

> "A JUROR: Pardon me, does this mean the taking of a life or something like that might be involved?

"THE COURT: The charge for the offense is assault with intent to murder with malice aforethought from the indictment and that's all I know about it. There is no death resulting, but there was an intention to kill. (Emphasis supplied) Is that your question, what the charge or what the result of a conviction might be?

"A JUROR: That's right."

The trial judge then told them that "the result of a conviction would not be the responsibility of this jury to determine." He continued, however, to explain the possible range of punishment for assault to murder with malice aforethought and without malice aforethought and of the possibility of probation. He concluded by telling them again that the issue of guilt would be the only one for them to determine and asked if this answered the question. The juror replied that it did.

Appellant complains of the emphasized words above. While the words literally appear to state an opinion they do not do so in the context of the judge's remarks. He also told them in these remarks that "I cannot anticipate what the facts will be in the case, because I haven't heard the evidence."

Hence, we conclude that the remark made in the particular context was not such that could be reasonably calculated to prejudice the appellant's rights. Howard v. State, Tex.Cr.App., 420 S.W.2d 706. Further, we note that no objection was made to the remark. See generally Minor v. State, Tex. Cr.App., 469 S.W.2d 579. No reversible error is shown.

(5) In a supplemental brief appellant claims the trial court committed fundamental error by failing to direct that appellant wear something other than Harris County Jail clothes during his jury trial. The record reflects two references to appellant's dress during the trial: one referred to him as wearing a "white uniform" and the other as wearing a "uniform". During voir dire of the jury panel the following statement was made by the prosecutor:

"This defendant is sitting in jail clothes. I am assuming he's been in jail to the time of this trial. You are not to take this into consideration. The fact a man is in jail clothes shouldn't make you feel he is guilty any more than if he were in street clothes."

The record reflects that this voir dire took place between 10:45 and 11:50 a. m. The jury was sworn in, the indictment read, a plea of "not guilty" entered, and the appellant was arraigned prior to separation for lunch. Undoubtedly the prospective jurors did view appellant in jail clothes.

Appellant claims that trying him in jail clothes infringed his fundamental right to be presumed innocent. Appellant did not object to this at or before trial. In Ephraim v. State, Tex.Cr. App., 471 S.W.2d 798, the defendant objected to being tried before a jury in jail clothing.

Absent an objection, it is presumed that he was willing to go to trial in jail clothing.

"A defendant may not remain silent and willingly go to trial in prison garb and thereafter claim

error." Hernandez v. Beto, 443 F.2d 634, 637 (5th Cir. 1971).

We are in agreement with this statement by the Fifth Circuit.[1] No error is shown.

(6) Finally, appellant complains in his third ground of error of ineffective assistance of counsel at trial. Although the record shows that appellant requested and was appointed counsel, the attorney so appointed did not represent him at the trial. It is not shown if trial counsel was appointed or retained. He complains that trial counsel made only one objection during the trial and made no objections to the court's charge, introduced no evidence on self-defense and did not subpoena a witness thought necessary by the appellant.

The record shows that counsel had the case postponed from July 15, 1970, to November 9, 1970. Counsel questioned the jury panel extensively on voir dire and cross-examined each of the State's witnesses attempting numerous times to raise the issue of self-defense. He was, however, unsuccessful in getting anyone to support his theory that Neatherlin was the aggressor. In his jury argument he argued that the facts showed no intent to kill and even attempted to argue self-defense. The record as a whole shows "(t)he trial could not be classified as a farce or mockery of justice which was shocking

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[1] Often as a matter of strategy, an appellant wants to be tried in jail clothing. It is common for a defense counsel to prove before the jury how long a person has been in jail. Garcia v. Beto, 452 F.2d 655 (5th Cir. 1971).

to the conscience of the Court, or one where the purported representation was only perfunctory, in bad faith, sham, pretense, or without adequate opportunity for conference or presentation." Thompson v. State, (No. 44,071, November 2, 1971).

We conclude that appellant's contention is without merit.

There is no reversible error. The judgment is affirmed.

MORRISON, J., not participating.

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1973

No. 73-3854

D. C. Docket No. CA-72-H-432

HARRY LEE WILLIAMS,
Petitioner-Appellant,

versus

W. J. ESTELLE, Director, Texas Department of Corrections, and C. V. KERN, Sheriff,
Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before TUTTLE, COLEMAN AND AINSWORTH,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the

said District Court with directions in accordance with the opinion of this Court.

September 6, 1974

Issued as Mandate: